T&J Container Systems, Inc., d/b/a T&J Trucking Co. *and* Rhode Island Laborers' District Council and its affiliated Local 1322, a/w Laborers' International Union of North America, AFL–CIO. Cases 1–CA–29701, 1–CA–29885, and 1–CA–29945

March 17, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On November 30, 1993, Administrative Law Judge Frank H. Itkin issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as explained below, and to adopt the recommended Order.

The Respondent is engaged in the collection of commercial trash. At its Johnston, Rhode Island facility, it employs approximately 20 truckdrivers, equipment operators, and mechanics. In August 1992,[3] truckdriver Robert K. Dorgan contacted the Charging Party (the Union) to begin an organizing drive among the Respondent's employees.

On August 11, Dorgan and other interested employees attended a union meeting. Following that meeting, Dorgan campaigned for the Union by soliciting and collecting signed union authorization cards from his coworkers.[4] On August 21, the Union filed with the Board a petition to represent the Respondent's employees. On August 28, Antonio Pedroso, the Respondent's co-owner and president, met with Dorgan and discharged him. During this period, Pedroso also spoke individually with employees Joseph Cruso, Eric Kelling, and William Melvin about the ongoing union organizing.

The judge found that through Pedroso's comments to Cruso, Kelling, Melvin, and Dorgan the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by threatening discharge and plant closure if employees selected the Union as their bargaining representative, by suggesting futility in employees' selection of the Union as their bargaining representative, by creating the impression that employee union activities were under surveillance, and by unlawfully promising benefits to an employee. The judge also found that the Respondent violated Section 8(a)(3) and (1) by discharging Dorgan. In addition, the judge imposed a bargaining order as part of his remedy.

After careful review of the record, we reject the Respondent's exceptions and adopt the judge's findings and remedy for the reasons stated in his decision. Each 8(a)(1) finding is supported by substantial evidence and is in full accord with governing legal principles. We also find sufficient evidence to support the judge's conclusion that Dorgan was unlawfully discharged for his union activity. We further find no merit to the Respondent's contention that a bargaining order is inappropriate because two unit employees who were directly subjected to the illegal activity have ceased working for the Respondent.

1. The analysis set forth in *Wright Line*[5] governs the determination whether Dorgan's discharge violated Section 8(a)(3) and (1) of the Act.[6] Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

Although the judge did not explicitly analyze Dorgan's discharge with a reference to *Wright Line*, his findings are consistent with that decision. He found that Dorgan was discharged because the Respondent

[1] On December 3, 1993, the judge issued an erratum which corrects his inadvertent omission of the provision for interest in his recommended Order and notice to employees. The error in the erratum has been noted and corrected.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1992 unless otherwise indicated.

[4] By September 4, a majority of the Respondent's employees had signed union authorization cards.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] See *Casey Electric*, 313 NLRB 774 fn. 2 (1994).

[7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) (''By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.'')

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

had recently learned from employee Cruso that Dorgan was chiefly responsible for the union campaign. Based on the credited evidence, he specifically rejected as pretextual the Respondent's asserted reason that Dorgan was fired because of his poor driving record. Therefore, the judge essentially found a prima facie case of discriminatory conduct and rejected as pretextual the Respondent's proffered defense.

The Respondent challenges the judge's findings regarding Dorgan's discharge on the following ground. It argues that it met its *Wright Line* burden by establishing that Dorgan would have been terminated in the absence of his protected union activity. According to the Respondent, Dorgan was terminated for his poor driving record. The Respondent points out that Dorgan was not a model employee, was involved in three accidents with company vehicles, and had accumulated more complaints about his driving than any other employee. Next, the Respondent claims that Dorgan had been terminated in late July for speeding and reckless driving and that he was later reinstated on a ''last chance'' agreement on July 25. Finally, the Respondent asserts that Dorgan breached that agreement by another incident of speeding and reckless driving on August 28, as reported to Pedroso by Edward Scanlon, the Respondent's sales manager, who witnessed the purported misconduct. The Respondent seeks dismissal of the complaint allegations regarding Dorgan's discharge.

We find that the Respondent's argument for dismissal relies on discredited testimony and completely ignores the evidence credited by the judge which reveals the following pertinent facts.[10] Before the union drive began, the Respondent had tolerated Dorgan's driving habits, despite alleged complaints from Scanlon and others, and had taken no action against him based on his driving record. Prior to August 28, Dorgan had never been disciplined for his involvement in accidents with company vehicles.[11] In addition, the Respondent had permitted Dorgan and its other drivers to operate company trucks which did not have functioning speedometers and brakes, thereby undercutting any purported safety concern to justify the Respondent's decision to discharge Dorgan.

With respect to the late July events, the credited evidence does not show, as claimed by the Respondent, that Dorgan was terminated for any bad driving[12] or that he was placed on a ''last chance'' agreement upon his return to work in July.[13] As noted by the judge, the Respondent had acknowledged that neither Dorgan's timecard nor any other company document corroborated the Respondent's version or its theory of the ''discharge'' of Dorgan in late July. Rather, Dorgan credibly testified that in his July 25 meeting, Pedroso voiced strong displeasure over his hairstyle. Dorgan further credibly testified that Pedroso sent him home because his hairstyle was unacceptable and that, a few days later, he was permitted to return to work after getting a haircut.

Regarding the August 28 events, the credited evidence reveals that Dorgan was not operating truck 31 in the manner contended by the Respondent. Dorgan credibly testified that truck 31 did not have a functional speedometer and its ''highest speed'' that day was only about 45 miles per hour. On the other hand, Pedroso initially testified that Scanlon observed truck 31 traveling ''around 70'' miles an hour that day, whereas Scanlon testified that he had reported 65 miles per hour. However, Pedroso later admitted in his testimony that the highest possible speed for truck 31 was ''54'' miles per hour. Furthermore, Scanlon testified that the posted speed limit on the road where he observed Dorgan's truck traveling on August 28 was 55 miles per hour. Thus, we find that, under the revised scenario presented by Pedroso and Scanlon at the hearing, Dorgan was properly driving within the posted highway speed limit.

The judge further credited Dorgan's account of his one-on-one interview with Pedroso in the latter's office on August 28. When Dorgan returned to the shop that day, Pedroso repeatedly interrogated him about his union involvement and responsibility for the instigation of the union campaign. Pedroso then told him that he was terminated for having a ''bad attitude'' without giving any specifics.[14] Interestingly, Pedroso did not mention Scanlon's complaint or accuse Dorgan of any speeding or reckless driving that day.

Given all the above circumstances, we find sufficient evidence supports the judge's finding that the Respondent's proffered reason for discharging Dorgan

[10] ''The ALJ alone had the opportunity to hear the testimony and observe the witnesses' demeanor; thus, he was best suited to resolve conflicts in testimony (case citation omitted).'' *NLRB v. Del Rey Tortilleria*, 787 F.2d 1118, 1121 (7th Cir. 1986), enfg. 272 NLRB 1106 (1984).

[11] In fact, the Respondent's general manager, Dorgan's father, characterized the last accident involving his son, which occurred about 2 weeks before August 28, as ''probably a non-preventable accident.'' Cf. *Synergy Gas Corp. v. NLRB*, 19 F.3d 649 (D.C. Cir. 1994), denying enf. in relevant part 309 NLRB 179 (1992) (where employee was lawfully fired for his gross negligence in causing an accident with a company vehicle).

[12] Contrary to the Respondent's assertion in its supporting brief to the Board, the record shows that the General Counsel has never conceded that Dorgan was terminated in July for speeding or reckless driving.

[13] Contrary to the Respondent's assertion in its supporting brief to the Board, the record shows that the General Counsel has never conceded the existence of a ''last chance'' agreement pertaining to Dorgan, that Dorgan was reinstated in late July according to such an agreement, or that Dorgan was working under the terms of such an agreement on August 28.

[14] See *Cla-Val Co.*, 312 NLRB 1050 (1993) (where the employer's statement that an employee had a ''negative attitude toward management'' was considered ''a euphemism for [the employee's] leadership role in the Union'').

was pretextual. Because the Respondent does not assert any business reason other than the one found to be pretextual, we find that the Respondent has not met its *Wright Line* burden. Accordingly, we adopt the judge's 8(a)(3) and (1) findings pertaining to Dorgan's discharge.

2. We agree with the judge that a bargaining order to remedy the Respondent's misconduct is necessary and warranted under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). We also are convinced that the Respondent's misconduct involves the type of severe and pervasive coercion that has lingering effects and that is not readily dispelled by time. The participation of the Respondent's top management ''show[s] that it is deeply committed to its anti-union position, a commitment from which it is not likely to retreat.''[15] The continuing presence of Pedroso as the Respondent's co-owner and president ''can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations.''[16] We further agree that an election would not reliably reflect genuine, uncoerced employee sentiment.[17]

The many unfair labor practices attributed to the Respondent's top management occurred within a short timespan, quickly after the Respondent had learned of the union organizing. In fact, Dorgan's discharge strategically came within only a few days after the filing of the Union's representation petition. The Respondent's unlawful conduct, by its onsite owner, encompassed a wide range of activity, including coercive interrogation, threats of discharge and plant closure, promise of benefits, and the summary discharge of the leading union adherent. Four employees, approximately 20 percent of a small bargaining unit, were direct targets of this illegal conduct.[18] But, more importantly, Pedroso's orchestrated discharge of Dorgan, who had attended all the union meetings and had solicited his coworkers to sign union authorization cards, sent a resounding message of demonstrated union animosity to the entire bargaining unit. This message by the management official in charge of the Respondent's daily operations necessarily carries great weight among the employees. Finally, even after Dorgan's discharge, Pedroso still exhibited concern about Dorgan's union activity and influence among the unit employees, as shown by his unlawful interrogation of employee Melvin.

In challenging the appropriateness of a remedial bargaining order, the Respondent argues that the judge failed to consider ''employee turnover'' in the unit. In support of this argument, the Respondent relies on *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991), and *Somerset Welding & Steel v. NLRB*, 987 F.2d 777 (D.C. Cir. 1993), where, in each instance, the court denied enforcement of the Board's bargaining order remedy. However, in making this argument, the Respondent does not allege that the composition of the unit has considerably fluctuated or changed since the commission of the unfair labor practices. On the contrary, the record shows, and the Respondent does not contend otherwise, that at least 90 percent of the unit employees working in 1992 are currently employed by the Respondent. Rather, the Respondent's defense emanates from the termination of employment of unit employees Cruso and Kelling.

We find no merit in its ''employee turnover'' argument and consider its reliance on *Avecor* and *Somerset Welding* to be misplaced. In *Avecor*, the court instructed the Board to consider employee turnover where the employer had contended that the bargaining unit had changed considerably as a result of growth and turnover and had supplied evidence indicating that only about 50 percent of its current employees were working at the earlier critical time. In *Somerset Welding*, 75 percent of the current employees continued to work at the company after the critical election period. We stress that, here, 90 percent of the unit, subjected to the Respondent's unlawful response to employees' union organizing, is still in place today.[19]

Accordingly, we find that the employees' desires for union representation, as reflected by their signed union authorization cards, would, on balance, be better protected by a bargaining order than by traditional remedies.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, T&J Container Systems, Inc., d/b/a T&J Trucking Co., Johnston, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[15] *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

[16] Id.

[17] See *NLRB v. Horizon Air Services*, 761 F.2d 22 (1st Cir. 1985).

[18] The 8(a)(1) activity was targeted not only at Cruso, Kelling, and Melvin, the three employees identified by the Respondent, but also at unit employee Dorgan. As previously stated here, Pedroso coercively interrogated Dorgan in his August 28 exit interview.

[19] We observe that the court in *Somerset Welding* also noted its unwillingness to enforce the Board's bargaining order remedy was based, in part, on its determination that the unlawful supervisor statements standing alone did not constitute sufficient evidence of pervasiveness. In this regard, the court observed that the administrative law judge had found that the supervisor statements at issue essentially rubber-stamped remarks by the company chairman, the legality of which the Board had found it unnecessary to pass on. Here, unlike the situation in *Somerset*, the bargaining order is premised on the swift and consistent, antiunion actions of the Respondent's owner and president, in particular, the unlawful discharge of Dorgan. Without question, Pedroso's unlawful conduct, given its source, would have considerable pervasive effect on employees.

its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Don C. Firenze, Esq., for the General Counsel.
Thomas J. McAndrew, Esq., for the Respondent.
Manuel F. Sousa, Esq., for the Union.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed by the Union in the above-proceedings on October 8 and 26, November 18, and December 30, 1992. A consolidated complaint issued on January 28, 1993. The complaint was later amended at the hearing. The General Counsel alleged in the consolidated complaint that Respondent Employer, in opposing the Union's attempt to represent its employees, violated Section 8(a)(1) and (3) of the National Labor Relations Act by coercively interrogating employees about employee union activities; threatening employees with discharge and closure of its business if they would not permit the Union to come in and thus it would be futile for them to select the Union as their bargaining representative; creating an impression among its employees that their union activities were under surveillance; promising employees benefits for not supporting the Union; and discharging employee Robert K. Dorgan because of his union and protected concerted activities. The General Counsel further alleged that, in view of the nature of the Employer's unfair labor practices, a bargaining order is an appropriate remedy in this case. Respondent Employer denied in its answer violating the Act and that a bargaining order should issue.

A hearing was held on the issues raised on May 3 and 4, 1993, in Providence, Rhode Island, and, on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer collects and disposes of commercial trash and is admittedly an employer engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. On August 21, 1992, the Union filed a petition with the Board seeking to represent a unit of the Employer's truckdrivers, equipment operators and mechanics. On September 8, the Union and the Employer executed a stipulated election agreement which was later approved by the Board's Regional Director. The appropriate bargaining unit, as stipulated, includes:

> All truckdrivers, equipment operators and mechanics employed by the Employer at its 2129 Plainsfield Pike, Johnston, Rhode Island facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

See Joint Exhibits 1(a), 1(b), and 1(c) and the General Counsel's Exhibit 4.

The evidence pertaining to the Employer's response to the Union's attempt to represent its employees and the related contentions of the parties is summarized below.

Robert K. Dorgan (Dorgan) testified that he was hired by the Employer in 1991 as a laborer. About 1 month later, he became a driver. His father, Robert J. Dorgan (Dorgan Sr.), was the Employer's general manager, and Antonio Pedroso was co-owner of the business. Dorgan recalled that during late July 1992, he and Pedroso had the following conversation ''in [Pedroso's] office'':

> He [Pedroso] told me [Dorgan] he had received a call that I cut someone off driving, and I asked him what he meant by that. He told me he'd do the talking and I wasn't allowed to inquire as to what he exactly meant by that. Then he further alluded to the fact that he didn't like my hair the way it was and told me if I didn't get it cut I would no longer work there . . . . I told him I wanted my job so I'd cut my hair, but I tried to bargain with him exactly how I could have my hair . . . and I wasn't allowed to bargain. . . . I asked him for a day to make an appointment with a hair designer and he wouldn't give it to me. He said you cannot come back, appointment or not, unless your hair is cut.

Dorgan had his mother cut his hair, and he returned to work a few days later.

Shortly thereafter, during early August 1992, Dorgan, as he further testified, went to the Union and enlisted its assistance ''to organize the employees at T&J.'' He was given union ''authorization cards to get signed.'' He attended a union meeting on August 11. He identified the cards signed by unit employees Jeffrey Greene on August 8; Paul Estrella on August 11; Richard Manco on August 11; Joseph Cruso on August 11; Steven Zawadowicz on August 11; Eric Kelling on August 11; Kevin Nicholson on August 11; Robert K. Dorgan on August 11; Nicholas Quintavallo on August 13; Walter Grover on August 19; Frank Gentile on August 11; and William Melvin on September 1. (See G.C. Exhs. 2(a)–(l).)

On August 28, 1992, Dorgan, as he recalled, was assigned to drive truck 31. This truck had ''a non-functional'' speedometer; ''it never functioned in [his] experience''; and the truck's ''highest speed'' was only about 45 miles per hour. He was instructed ''to go from [the] shop in Johnston to Jamestown, Rhode Island and pick up a container of trash.'' After arriving at Jamestown, he was notified by his father ''to come directly to the shop.'' Upon his return to the ''shop,'' he had the following conversation with Pedroso:

> He [Pedroso] asked me [Dorgan] if I knew anything about union activity in the shop. I said I didn't know anything. He said he had an idea that I was running it. I still said I didn't know anything about it. Then he alluded to the idea that I had a bad attitude toward his general manager, being my father. I asked him what he meant by that. He didn't give me an answer . . . . He told me he was going to terminate me for my misconduct, my attitude toward his general manager, and . . . told me to punch out and leave.

On cross-examination, Dorgan acknowledged that previously, about February 29, 1992, while driving a truck for the Employer, he was involved in an accident resulting in the death of a person in another vehicle. He was not charged with a violation of the law or disciplined by the Employer for this accident. Later, about April 20, he had another accident at an intersection for which he was given ''a ticket'' for ''going through a yield sign.'' This charged violation is

''currently in litigation.'' (See R. Exh. 2.) Management did not ''confront'' him or ''talk'' to him about this April 20 accident. Later, in July, as noted above, he was told by Pedroso that ''he [Pedroso] had received a call that I [Dorgan] had cut somebody off, but that was the extent of it.'' Dorgan also acknowledged having ''another accident'' about August 12. He recalled:

> I was coming off a . . . ramp from the highway, . . . and the relay which is incorporated into the breaking system failed on my truck causing me to rear end another car, the truck was put out of commission for the same thing the day before by the department of transportation . . . . [The Employer was informed of the problems with the truck] that morning [and on] the day before. [See R. Exh. 3.]

Joseph Cruso testified that he was hired by the Employer as a welder in 1991; that he was later ''fired'' in October 1992; and that shortly prior to coworker Dorgan's ''discharge,'' he had the following conversation with Pedroso ''in the office'':

> Tony [Pedroso] . . . asked me [Cruso] how things were going in the shop . . . and I said I didn't like a few things . . . . Pedroso said I had a bad attitude towards the way I was working and the Company. He mentioned . . . that I've said things about the Company before, and he said he wanted to do the right thing and have the Company run the right way, and he asked me if I wanted to be a team player, a part of the Company. He wanted everybody to work as a team. . . . I said yes, I want to be a part of the team. This is where I work and I like my job. . . . Tony said all right . . . let past go and start a fresh slate, . . . we shook hands and I went back to work.

Cruso recalled that on the following day he and Pedroso had another conversation ''outside the garage'':

> Tony [Pedroso] said I want to see how much of a team player you [Cruso] are, and I said what do you mean. And he said well I want to know what's going on with the Union, who started the Union, who was at the Union meetings. I said I didn't know. He said well you're not a team player. He started to walk away. I said well what do you want to know. He said I want to know who started the Union, and I told him who started the Union . . . . I named Robbie Dorgan as starting the Union, Steve Zawadowicz as going to the meeting [and] Eric Kelling went to the meeting . . . . [I] named the rest of the guys, . . . and Tony said . . . there's a kid that I do a lot for and he's going to do this to me [referring to Dorgan].

Later that same day, according to Cruso, Pedroso again approached Cruso at work and ''asked [him] for the names again, . . . [Cruso] named the employees . . . that went to the meeting, . . . [Pedroso] wrote them down.'' Cruso subsequently went back to Pedroso, and ''[Cruso] said . . . are you [Pedroso] going to fire these guys because if you do they're going to know that I said something to you about the Union.'' Pedroso assured Cruso that he ''would take care of that'' and ''don't worry.''

Cruso next testified that Everett Melvin was a ''supervisor'' for the Employer. Everett Melvin had an office; gave him ''work assignments''; and ''sent him home early.'' Cruso recalled reporting for work ''late'' one day because on the prior day he had been ''sent home for a day for no reason at all.'' Cruso was then called into ''the office.'' Present were Cruso, Pedroso, Everett Melvin, and Dorgan Sr. Cruso testified:

> Tony [Pedroso] asked me if I [Cruso] was spiting him and I said no, . . . it upset me and I didn't like the way things were going, . . . I work hard and it wasn't right. And they said I had a bad attitude again and I should change. . . . Tony said that he would take care of me later in time when the Union thing was all over, to just do the right thing.[1]

Eric Kelling testified that he previously had worked for the Employer as a mechanic; that prior to Dorgan's ''discharge,'' he and Pedroso had the following conversation ''in the office'': ''He [Pedroso] asked me [Kelling] about the Union and what did I think about it. . . . I said I didn't know enough about it at the time.'' Kelling recalled that later:

> [E]very day I went to work and worked in his [Pedroso's] office, he'd question me about it in one way or another. He asked me if I had gone to the meeting . . ., or said that he knew I had gone to a Union meeting. . . . He said it would kill the business and then nobody would have a job. And he said that if you think the Union is going to come in and tell me how to run my business and pay my employees you're f—king crazy. . . . This was like in the course of a week. It started off slow and then he started hitting me with heavier things as it progressed and he found out more about the Union coming in.[2]

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[1] On cross-examination, Cruso acknowledged filing an unfair labor practice charge against the Employer as a result of his October ''discharge'' and this charge was later ''dismissed.'' He also acknowledged that Everett Melvin spent ''maybe two to three hours in the office'' during the workday; worked with the mechanics ''better than half of the workday''; and wore a shirt that said ''foreman'' on it.

In addition, Steven Zawadowicz testified that he has been employed by the Employer for about 6 years as a truckdriver; that he had been informed by management that Everett Melvin was a ''foreman'' or ''supervisor''; that during August 1992 Everett Melvin ''discharged'' him; that 2 or 3 days later Dorgan Sr. telephoned him to come back to work explaining that his ''discharge'' was a ''mistake''; and that he in fact returned to work a few weeks later. See also the testimony of Dorgan pertaining to the supervisory status of Everett Melvin. [Tr. 50–54.]

[2] Kelling was ''fired'' during early September 1992. Everett Melvin told Kelling that he was ''discharged.'' Everett Melvin ''told me [Kelling] grab my tool box and my shit and leave, you're fired.'' Kelling was thereafter recalled Dorgan Sr. who explained to the employee that Pedroso ''wanted'' him ''back.'' In addition, Kelling noted that Everett Melvin would give him his ''work assignments''; ''most of the time [Everett] Melvin was my boss and gave me what to do.'' Kelling also noted that, with respect to truck 31, it was ''old'' and ''probably didn't get over 35 miles an hour'' when he had observed the vehicle. On cross-examination, Kelling acknowledged that Everett Melvin ''spent most of his time in the garage doing work around the trucks and things . . . .'' He also recalled

Continued

William Melvin testified that he has been employed by the Company for the past 3 years as a truckdriver; that he attended a union meeting about September 1, 1992; and that Pedroso later had the following conversation with him ''outside the time clock in the garage'':

> He [Pedroso] just asked me [William Melvin] . . . he heard that I went to [a union meeting]. He asked me if I went to it. I said yeah. He asked me if I knew any of the guys that were there, and I said a bunch of guys from the Company. . . . The only name he brought up was Robbie [Dorgan], if Robbie was there. He brought up his name, but everybody knew Robbie was there at all the meetings. . . . [I said] yes.

Dorgan was no longer ''working'' for the Employer at the time of this conversation.

William Melvin also recalled getting a ''speeding ticket'' during his employment with the Company. The speedometer on his truck ''was not operating.'' He later informed the Employer about the ''speeding ticket'' and was told by Dorgan Sr. that ''speeding tickets are your own responsibility.'' He was not given any ''warnings about being disciplined if [he] got further tickets.''

Richard Manco has worked as a mechanic and truckdriver for the Employer since August 3, 1992. Manco identified Everett Melvin as his ''boss''; Everett Melvin was his ''boss'' ''until December 1992 or January 1993.'' Dorgan Sr. had stated that Everett Melvin ''was a boss'' and ''the head mechanic'' when Manco ''first started there.'' Everett Melvin had ''interviewed'' Manco before Manco ''got hired.'' And Tony Pedroso had told Manco that ''whatever [Everett Melvin] says he stands behind 100 percent.'' On cross-examination Manco recalled that Everett Melvin spends about ''half a day'' ''performing mechanic functions and duties'' and Dorgan Sr. ''generally does the hiring.''

Tony Pedroso is co-owner and president of Respondent Company. He testified that he fired Dorgan on August 28 for the following ''reasons'':

> It was a combination from the entire year of excessive accidents and reckless driving, one of them being a fatality. And, while I [Pedroso] wasn't around previous to July, I was aware of these accidents that he [Dorgan] did have and so forth. But being that he was my general manager's son [Dorgan Sr.] I kind of let it go out of respect for him and so forth.
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> [A]round July 20 this is where the problems started to happen. We received a call, my partner [John DiRaffael] did, from a friend . . . stating that there was a driver driving wild down the road. All he knew was what the truck number was . . . . So I told my partner DiRaffael [who] proceeded to tell [Dorgan Sr.] that he better talk to his son because of the previous accidents and so forth. Talk to your son; it's got to stop . . . . Within two days my father-in-law, Mr. Sylvestry, was speaking to John [DiRaffael] [and] said there was a guy driving, speeding recklessly down the road, . . . he spotted the truck number [and] told John [DiRaffael]. . . . John blew up. He [John DiRaffael] said, Bob [Dorgan Sr.], you're going to have to fire your son, [and] Bob fired his son.
>
> The next day, John [DiRaffael] and I noticed that the father [Dorgan Sr.] was very depressed and down and so forth. We talked with each other about [Dorgan] [and] we decided let's give him another chance. . . . I told my partner, tell Bob [Dorgan Sr.] to have [his] son come in . . . . So, Dorgan came in. I said . . . your father is a good man for me here. He cares about you. I want you to know that only out of respect for your father are you getting another chance. I'm giving you one last chance. Okay, stop the speeding . . . stop the recklessness. Pay attention to what you are doing . . . . [A]nother thing, . . . I says, . . . your hair it looks totally ridiculous . . . you look like you just came off an Indian reservation with that tomahawk haircut. You're representing my Company and I don't think that's a reasonable haircut. His [Dorgan's] response was, I want to thank you very much for this opportunity . . . I appreciate it . . . and the problem wouldn't happen [again] . . . and I will take care of my hair . . . . Consequently, he . . . showed up Monday because his mom cut his hair on Sunday. . . . . [E]verything was fine basically from then on . . . . Then [on August 28] I received a call from my sales manager [Edward Scanlan]. He said . . . this kid Dorgan . . . he's speeding . . . driving recklessly . . . . Somebody had to stop the kid before someone else gets hurt. . . . I immediately told [Dorgan Sr.] call your son in now. . . . He was here within the hour. His dad sent him to my office. I informed him . . . I can longer tolerate your driving habits. I'm going to have to let you go. His response was, we'll see.''[3]

Pedroso claimed that Scanlan had related to him on August 28 that Dorgan was driving a Company truck ''around 70'' miles per hour. Pedroso acknowledged, however, that ''truck 31 I don't believe would go that fast ''; the ''maximum speed'' of truck 31 ''as of today'' is ''54'' miles per hour. Pedroso then claimed that he ''did not know'' that Dorgan was in fact driving truck 31 prior to firing him and he admittedly made no ''further inquiry.'' Pedroso also claimed that on August 28 he ''had no idea of which employees were in favor of the Union.'' Pedroso elsewhere acknowledged stating in a prehearing affidavit that:

> Joseph Cruso [had] said that he was on my side. Heknew that certain people signed cards. He mentioned a few people that signed cards for the Union. I don't recall what names he gave me. He also told me that they were having Union meetings.

Pedroso admitted that Cruso in fact had ''indicat[ed] that Dorgan had a leadership role in the Union drive in that conversation.'' Pedroso also admitted that the above ''conversation'' ''was within a few days of [an earlier] conversation [with Cruso] about how [Cruso] could get a raise,'' which how Everett Melvin ''got me my job back'' after an earlier ''firing.''

[3] DiRaffael and Sylvestry, referred to above in Pedroso's testimony, did not testify.

conversation, according to the affidavit, was ''around the end of August.'' (See G.C. Exh. 3.)[4]

Pedroso asserted that he first became aware of the Union's organizational drive on August 26 when he received a copy of the representation petition filed with the Board. He testified:

> Q. Did you have any conversations with any of your employees . . . between August 26 and August 28?
>
> A. As far as I'm concerned I was too busy trying to obtain what I needed to handle the situation. . . . As far as I'm concerned, no, I did not have any conversations.

Pedroso claimed that he spoke to Cruso after Dorgan's firing; ''[Cruso] said he would like to make more money'' and ''he felt Roger Bessell was picking on him.'' Pedroso denied that Cruso said anything to him about the Union. Pedroso also claimed that Cruso came to him later with similar complaints. Again, nothing was said about the Union. Pedroso next claimed that ''a couple of days later'' Cruso

> started to tell me about the Union situation and having meetings and that he wanted me to know that he doesn't want it and he knows who signed the cards. And he mentioned the two names, as I said, Wally and Jeff and Dorgan and a couple of others. I said . . . thank you . . . for the information . . . and that was it.

Pedroso next claimed that

> [A]t the end of that same day [Cruso] . . . said to me, are you going to let the other guys know that I told you all this here, . . . [and] I said . . . don't worry about it.

Pedroso denied, inter alia, various coercive statements and conduct attributed to him as recited above.[5]

Edward Scanlan is the Employer's sales manager. He testified that on August 28 he observed Dorgan driving a company truck ''weaving from lane to lane . . . [with] brake lights coming on as [Dorgan] tried to get in between cars.'' Scanlan promptly reported to Pedroso that Dorgan was in fact then driving about 65 miles per hour ''speeding'' ''recklessly'' ''weaving in and out'' ''making us look like retards out there.'' Scanlan, when asked ''did you actually form a judgement as to how fast [Dorgan] was going,'' responded: ''I tried I'm not an expert at it.'' He later added: ''I figured [Dorgan] was going faster than he should have.'' He also acknowledged that the speed of his own vehicle at the time was about 63 to 65 miles per hour because he was ''speeding up to catch'' Dorgan about ''150 yards'' away. He then claimed that the speed limit in the area was 50 miles per hour. He later acknowledged that the posted speed limit in the area was 55 miles per hour.

Scanlan claimed that he had observed Dorgan ''drive recklessly prior to August 28.'' He claimed that Dorgan drove ''in the yard with the boom up shifting through the yard in three or four gears''; ''there was an incident in July on the Newport bridge''; and ''it was everyday'' ''in the yard.'' Scanlan assertedly reported the above incidents to Dorgan Sr. ''every time I saw something, five or six times, . . . it could have been ten times, . . . I didn't . . . mark it down.'' Dorgan Sr. assertedly told Scanlan that he ''would take care of it'' but he did ''not take care of it.'' Scanlan acknowledged that none of these incidents were ''written up.'' Scanlan also claimed that Dorgan ''should have been fired long before'' ''maybe four to six weeks after he started'' working for the Company.

Robert J. Dorgan Sr. testified that he is general manager for the Employer. Dorgan Sr. assertedly had received some ''six'' or ''eight'' ''complaints'' concerning his son's ''reckless driving'' as of July 1992, including the ''complaint'' from Sales Manager Scanlan pertaining to ''speeding on the Jamestown bridge.'' These ''complaints'' ''cover'' a ''four or five month period.'' Dorgan Sr. later told his son that ''the instances of speeding and reckless driving have got to stop.'' There are, however, no records of the ''complaints'' or action taken by Dorgan Sr. In addition, Dorgan Sr. was ''aware'' that his son was involved in a fatal accident during February 1992 and ''another accident'' in April 1992 and ''another incident'' in July 1992.

Dorgan Sr. claimed that he in fact had ''fired'' his son on instructions from Co-owner DiRaffael in July 1992. Dorgan Sr. assertedly had not ''fired'' his son earlier because he was ''not doing a good job as a manager.'' According to counsel for the Employer (Tr. 353), young Dorgan ''was out of work but one day after he was fired'' whereupon he promptly resumed his truckdriving duties. And, counsel for the Employer acknowledged that neither young Dorgan's timecard nor any other company record ''documents the firing'' (Tr. 355.) Upper management then decided to recall young Dorgan assertedly because his father became ''extremely depressed.'' Dorgan Sr. testified:

> [His son] was given an opportunity to get his job back . . . . [I]t was suggested that he get a haircut and look like a regular person . . . [and] keep his speed down, act in a responsible manner and do the same as most of the other guys do . . . [or] probably get fired.

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[4] Pedroso also claimed that prior to September 1992 Everett Melvin ''was replaced with someone [Roger Bessell] in a supervisory position'' and thus ''[Everett Melvin] became a [unit] driver'' ''entitled to vote'' in the representation election. Everett Melvin's hourly rate of pay, which was substantially higher than the hourly rate of pay for rank-and-file employees, did not change by this claimed transition from ''working foreman'' to ''driver.'' Pedroso denied that Everett Melvin exercised various indicia of supervisory status during the pertinent time period. Elsewhere, counsel for General Counsel and the Employer stipulated that Everett Melvin ''remained a working foreman . . . in September.'' (See Tr. 340–341.)

In addition, Pedroso claimed that Zawadowicz was ''unjustly fired'' by Everett Melvin ''in August 1992'' and Everett Melvin ''didn't have authority to do it.'' Pedroso assertedly spoke to Zawadowicz ''a couple of weeks later or something like that'' and Zawadowicz then ''took time off'' that ''was not approved by the Company.'' Pedroso assertedly ''didn't really know if [Zawadowicz] was really going to come back to work.'' Pedroso admittedly ''took back [Zawadowicz] when he [later] showed up.''

[5] With respect to employee Kelling, Pedroso claimed, inter alia, that Kelling ''would initiate the conversation to see what he could find out from me'' and did not ''tell . . . who was involved with the labor organization.'' With respect to employee William Melvin, Pedroso admitted that this employee had told him ''that he had gone to a Union meeting'' but ''I don't say anything.''

Dorgan Sr. next recalled that his son was involved on August 12 in ''another accident.'' However, he characterized this accident as ''probably a non-preventable accident'' because ''the brake springs on one of the cams let go'' and, consequently, ''nothing was done'' to his son.

In addition, Dorgan Sr. denied, inter alia, that Everett Melvin possessed various indicia of supervisory status and was instead ''an hourly paid employee'' who spent ''probably about 80 percent'' of his time ''working as a mechanic or working in the garage.'' Dorgan Sr. claimed that Everett Melvin did not ''have the authority to fire'' Zawadowicz and Dorgan Sr. later notified Zawadowicz, after being instructed by Pedroso, that ''Mel didn't have the authority to terminate him'' and Pedroso ''wanted to see him.'' Zawadowicz returned to work ''eventually'' after taking a ''vacation'' or ''some time off.''[6]

I credit the testimony of Robert K. Dorgan, Joseph Cruso, Steven Zawadowicz, Eric Kelling, William Melvin, and Richard Manco as recited above. Their testimony is in significant part mutually corroborative of the Employer's conduct in response to the employees' attempt to obtain Union representation. Their testimony is also substantiated in significant part by admissions of Respondent Employer's witnesses. And, on this full record, I am persuaded that their testimony represents a complete and reliable account of the pertinent sequence of events. On the other hand, I do not credit the testimony Tony Pedroso, Edward Scanlan, and Robert J. Dorgan insofar as their testimony conflicts with the testimony of the above witnesses. The testimony of Tony Pedroso, Edward Scanlan, and Robert J. Dorgan was at times incomplete, unclear, vague, evasive, shifting, and contradictory. They did not impress me as trustworthy or reliable witnesses. In sum, as discussed below, I find and conclude here that the Employer, in response to the employees' attempt to obtain union representation, engaged in the coercive conduct credibly related by the employee witnesses, and discharged Robert K. Dorgan because he was chiefly instrumental in obtaining union assistance and initiating the organizational drive. As for the Employer's assertions to the effect that Dorgan was discharged because of his cited driving record, I do not credit and reject these belated and shifting claims as pretextual. The Employer was apparently willing to tolerate Dorgan's cited driving record until he became chiefly instrumental in obtaining union assistance and initiating the organizational drive. Dorgan was summarily discharged on August 28 because he had brought the Union to the Employer's facility.

[6] Counsel stipulated that as of September 4, 1992, the stipulated bargaining unit included the following employees:

1. David Barrett
2. Paul Carnevale
3. John Cornell
4. Paul Estrella
5. Frank Gentile
6. Daniel Goodsoe
7. Jeffrey Greene
8. Walter Grover
9. Edward Melvin
10. Ken Melvin
11. William Melvin
12. Kevin Nicholson
13. Nicholas Quintavallo
14. Robert or Roger Bessell
15. Rui Duarte
16. Richard Manco
17. Joseph Cruso
18. Edward Scanlan III
19. Eric Kelling

Counsel further stipulated that Robert K. Dorgan would also be included in this unit as of September 4 ''if he were discriminatorily discharged'' and that Everett Melvin would also be in this unit if not found to be a ''supervisor'' as alleged by counsel for the General Counsel. In addition, counsel for the General Counsel claimed that Steven Zawadowicz should also be included in this unit because he was employed on September 4. Counsel for the Employer generally asserted that Zawadowicz ''was not on the payroll at that point in time and we did not know whether [he] was going to come back to work.''

Discussion

Section 7 of the National Labor Relations Act guarantees employees the ''right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'' as well as the right ''to refrain from any or all such activities.'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain or coerce employees in the exercise of'' their Section 7 rights. Section 8(a)(3) forbids ''discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.''

An employer, under settled principles of labor law, violates Section 8(a)(1) of the Act by coercively interrogating employees about employee union activities; threatening employees with discharge and closure of its business if they select a union as their bargaining representative; telling employees that it would not permit a union to come in and thus it would be futile for them to select a union as their bargaining representative; creating an impression among its employees that their union activities are under surveillance; and promising employees benefits for not supporting a union. An employer, under equally settled principles of labor law, violates Section 8(a)(1) and (3) of the Act by discharging an employee because of his union and other protected concerted activities. See *Yerger Trucking*, 307 NLRB 567 (1992); *Cumberland Farms*, 307 NLRB 1479 (1992); *Pennsy Supply*, 295 NLRB 324 (1989); *Southwire Co.*, 277 NLRB 377 (1985); *Migali Industries*, 285 NLRB 820 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In the instant case, during early August 1992, as employee Dorgan credibly testified, Dorgan went to the Union and enlisted its assistance ''to organize the employees at T&J.'' He was given union ''authorization cards to get signed.'' He attended a union meeting on August 11. He obtained the signatures of 12 unit employees on union ''authorization cards.'' And, on August 21, the Union filed a petition with the Board seeking to represent a unit of the Employer's truckdrivers, equipment operators, and mechanics. The Employer responded with the following coercive conduct in an attempt to defeat this organizational effort.

Employee Cruso credibly testified that shortly prior to coworker Dorgan's ''discharge'' on August 28, Pedroso, coowner of Respondent, had the following conversation with him ''outside the garage'':

> Tony [Pedroso] said I want to see how much of a team player you [Cruso] are, and I said what do you mean. And he said well I want to know what's going on with the Union, who started the Union, who was at the Union meetings. I said I didn't know. He said well you're not a team player. He started to walk away. I said well what do you want to know. He said I want

> to know who started the Union and I told him who started the Union . . . . I named Robbie Dorgan as starting the Union, Steve Zawadowicz as going to the meeting [and] Eric Kelling went to the meeting. . . . [I] named the rest of the guys, . . . and Tony said . . . there's a kid that I do a lot for and he's going to do this to me [referring to Dorgan].

Pedroso again approached Cruso at work that same day and ''asked [him] for the names again, . . . [Cruso] named the employees . . . that went to the meeting, . . . [Pedroso] wrote them down.'' Cruso subsequently inquired, ''[A]re you [Pedroso] going to fire these guys because if you do they're going to know that I said something to you about the Union.'' Pedroso assured Cruso that he ''would take care of that'' and ''don't worry.'' And, in addition, Pedroso later assured Cruso that ''he would take care of [Cruso] later in time when the Union thing was all over, to just do the right thing.''

Employee Kelling credibly testified that prior to Dorgan's ''discharge,'' he and Pedroso had the following conversation ''in the office'': ''He [Pedroso] asked me [Kelling] about the Union and what did I think about it. . . . I said I didn't know enough about it at the time.''

Kelling credibly recalled that later,

> . . . every day I went to work and worked in his [Pedroso's] office, he'd question me about it in one way or another. He asked me if I had gone to the meeting . . . or said that he knew I had gone to a Union meeting. . . . He said it would kill the business and then nobody would have a job. And he said that if you think the Union is going to come in and tell me how to run my business and pay my employees you're f—king crazy.

In like vein, employee William Melvin credibly testified that Pedroso had the following conversation with him ''outside the time clock in the garage'':

> [Pedroso] just asked me [William Melvin] . . he heard that I went to [a union meeting]. He asked me if I went to it. I said yeah. He asked me if I knew any of the guys that were there, and I said a bunch of guys from the Company. . . . The only name he brought up was Robbie [Dorgan], if Robbie was there. He brought up his name, but everybody knew Robbie was there at all the meetings . . . . [I said] yes.

And, finally, on August 28, Dorgan, as he credibly recalled, was assigned to drive truck 31. This truck had ''a non-functional'' speedometer; ''it never functioned in [his] experience''; and the truck's ''highest speed'' was only about 45 miles per hour. He was instructed ''to go from [the] shop in Johnston to Jamestown, Rhode Island and pick up a container of trash.'' After arriving at Jamestown, he was notified by his father ''to come directly to the shop.'' Upon his return to the ''shop,'' he had the following conversation with Pedroso:

> He [Pedroso] asked me [Dorgan] if I knew anything about Union activity in the shop. I said I didn't know anything. He said he had an idea that I was running it. I still said I didn't know anything about it. Then he alluded to the idea that I had a bad attitude toward his general manager, being my father. I asked him what he meant by that. He didn't give me an answer . . . . He told me he was going to terminate me for my misconduct, my attitude toward his general manager, and . . . told me to punch out and leave.

I find and conclude that the above credited evidence of record clearly establishes that Respondent Employer, in an attempt to defeat its employees' organizational effort, violated Section 8(a)(1) of the Act by coercively interrogating employees about employee union activities; threatening an employee with discharge and closure of its business if the employees select the Union as their bargaining representative; telling an employee that it would not permit the Union to come in and thus it would be futile for the employees to select the Union as their bargaining representative; creating an impression that employee union activities were under surveillance; and promising an employee benefits for not supporting the Union.

In addition, I find and conclude that the above credited evidence of record clearly establishes that the Employer discharged employee Dorgan on August 28 because the Employer had been informed that Dorgan was chiefly responsible for the union campaign. I do not credit and reject as pretextual the Employer's assertions to the effect that Dorgan was discharged because of his cited driving record. Pedroso's own testimony shows that the Employer was willing in the past to tolerate this cited driving record as well as one or more of its trucks operating without working speedometers and operational brakes. Indeed, when Pedroso assertedly called Dorgan in during July to complain about the employee's driving record and give him one more chance, Pedroso was apparently more concerned about Dorgan's haircut than what steps could be taken to improve the safety record of the Employer's employees and its equipment. Significantly, although Dorgan was involved in a later accident in August, the Employer apparently took no real steps to assure itself that Dorgan was not at fault. It was not until August 28, shortly after the Employer had discovered through its coercive interrogations and related conduct that Dorgan was the employee responsible for the Union's drive, when it decided to summarily fire him. In sum, Dorgan was fired because of his Union and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.[7]

CONCLUSIONS OF LAW

1. Respondent Employer is engaged in commerce and Charging Party Union is a labor organization as alleged.

2. Respondent Employer violated Section 8(a)(1) of the Act by coercively interrogating employees about employee union activities; threatening an employee with discharge and closure of its business if the employees select the Union as their bargaining representative; telling an employee that it

[7] In addition, on this record, I reject the assertion that Dorgan would have in any event been discharged for lawful nondiscriminatory reasons. As noted, the Employer was apparently willing to tolerate Dorgan's cited driving record as well as one or more of its trucks operating without functional speedometers and operational brakes. This record does not support the assertion that the Employer would have fired Dorgan on or about August 28 for lawful nondiscriminatory reasons.

would not permit the Union to come in and thus it would be futile for the employees to select the Union as their bargaining representative; creating an impression that employee union activities were under surveillance; and promising an employee benefits for not supporting the Union.

3. Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employee Dorgan because of his union and protected concerted activities.

4. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct and, for the reasons explained below, in any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, and to post the attached notice. Respondent Employer, having violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employee Robert K. Dorgan, will be directed to offer to the discriminatorily discharged employee immediate and full reinstatement to his former job or, in the event his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his discriminatory discharge, by making payment to him of a sum of money equal to that which he normally would have earned from the date of Respondent Employer's discriminatory conduct to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 651 (1977), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing*, 138 NLRB 716 (1962).

Respondent Employer will also be directed to preserve and, on request, make available to the Board or its agents for examination and copying all payroll records and reports and all other records necessary to determine backpay and compliance with this Decision and Order. Respondent Employer will be directed to expunge from its files any references to the discriminatory discharge of employee Dorgan and notify the discriminatee in writing that this has been done and that evidence of this disciplinary action will not be used as a basis for future personnel action against him, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

The General Counsel argues that the Employer's unfair labor practices in the instant case are so serious and substantial that the possibility of erasing their effects and conducting a fair representation election by the use of traditional remedies is slight and, consequently, a bargaining order should issue in accordance with the principles stated by the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). For the reasons stated below, I agree.

Respondent Employer stipulated, and I find and conclude, that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truckdrivers, equipment operators and mechanics employed by the Employer at its 2129 Plainsfield Pike, Johnston, Rhode Island facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union initiated its campaign to represent the above unit employees during early August 1992. As of September 4, 12 of the 21 unit employees had signed clear and unambiguous union authorization for representation cards. (See G.C. Exhs. 2(a)–(l).) As stipulated (see fn. 6, supra), the above unit included the 19 named employees and discriminatorily discharged employee Dorgan. The above unit also included employee Zawadowicz. Zawadowicz credibly testified that he has been employed by the Employer for about 6 years as a truckdriver; that during August 1992 Everett Melvin ''discharged'' him; that 2 or 3 days later Dorgan Sr. telephoned him to come back to work explaining that his ''discharge'' was a ''mistake''; and that he in fact returned to work a few weeks later. Zawadowicz, 1 of the 12 union card signers, was a unit employee during the pertinent time period. Cf. *Town Concrete Pipe*, 259 NLRB 1002 (1982); and *Delta Pine Plywood Co*., 192 NLRB 1271 (1971).

Counsel for the Employer contends that Everett Melvin should also be included in this unit. I reject this contention because Everett Melvin, as argued by counsel for the General Counsel, was a ''supervisor'' during the pertinent time period. A ''supervisor'' is defined in Section 2(11) of Act as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a ''title and theoretical power to perform one or more of the enumerated functions.'' *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) are to be read in the disjunctive, Section 2(11) also ''states the requirement of independence of judgment in the conjunctive with what goes before.'' *Poultry Enterprises, v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely ''routine,'' ''clerical,'' ''perfunctory,'' or ''sporadic'' manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146–149 (5th Cir. 1967). The ''decisive question is whether [the individual involved] has found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act.'' See *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331, 334 (1st Cir. 1948).

Applying these principles of law to the credited evidence of record, I find and conclude that Everett Melvin was a ''supervisor'' during the pertinent time period. Thus, as recited above, Everett Melvin was given an ''office'' by management; was introduced to rank-and-file employees by management as ''a boss'' and ''supervisor''; gave rank-and-file employees their ''work assignments'' and ''told them what to do''; sent rank-and-file employees ''home early''; notified rank-and-files that they were ''discharged''; ''interviewed'' a rank-and-file employee before he was ''hired''; was paid a significantly higher hourly rate than rank-and-file employees; and ''got'' a rank-and-file employee his ''job back'' after being ''fired.'' In sum, Everett Melvin had the authority, in the interest of the Employer, to, inter alia, discipline employees and responsibly direct them, and the exercise of such authority was not of a merely routine or clerical nature, but required the use of independent judgment.[8]

Here, as in *Bakers of Paris*, 288 NLRB 991 (1988), ''Respondent's unlawful conduct warrants the imposition of a *Gissel* . . . bargaining order to protect the employees' majority selection of a bargaining representative based on authorization cards'' because,

> given the swiftness, severity and extensiveness of the Respondent's unfair labor practices . . . it [is] highly unlikely that its employees would be willing or able to freely express their choice in [a Board-conducted representation election].

The Employer, in prompt response to the employees' attempt to obtain union representation, repeatedly and coercively interrogated employees about employee union activities; threatened discharge and closure of its business if the employees select the Union as their bargaining representative; warned that it would not permit the Union to come in and thus it would be futile for the employees to select the Union as their bargaining representative; repeatedly created an impression that employee union activities were under surveillance; promised benefits for not supporting the Union; and, finally, summarily fired the employee chiefly responsible for the organizational effort.

The above are clearly ''hallmark'' violations of the Act designed to defeat the employees' attempt to obtain union representation in a Board-conducted election. They were engaged in by the Employer's co-owner. The unit employees, under the circumstances present here, would not be able to readily forget the results of their attempt to obtain union representation. As the Board recently stated in *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992):

> We find that these 8(a)(1) and (3) violations, which threaten the very livelihood of employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies, especially given the small size of the bargaining unit and the fact that the unfair labor practices affected each of the employees.

See also *Yerger Trucking*, supra; and *Interstate Truck Parts*, 312 NLRB 661 (1993).[9]

Accordingly, I find and conclude that a bargaining order is warranted here and September 4 is the appropriate date to use for this remedial order because by that date, as stipulated, the Union had obtained a clear majority status. See *Roadway Inn of Las Vegas*, 252 NLRB 344 fn. 3 (1980), and *Q-1 Motor Express* and *Yerger Trucking*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, T&J Container Systems, Inc., d/b/a T&J Trucking Co., Johnston, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge and closure of its business if the employees select Rhode Island Laborers' District Council and its affiliated Local 1322, a/w Laborers' International Union of North America, AFL–CIO (the Union) as their bargaining representative; coercively interrogating employees about employee union activities; telling employees that it would not permit the Union to come in and thus it would be futile for the employees to select the Union as their bargaining representative; creating an impression that employee union activities were under surveillance; and promising employees benefits for not supporting the Union.

(b) Discriminatorily discharging its employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employee Robert K. Dorgan immediate and full reinstatement to his former job or, in the event his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his discriminatory discharge, with interest, as provided in the Board's Decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary and useful in analyzing and computing the amount of backpay and compliance with the Board's Decision and Order.

(c) Expunge from its files any references to the discriminatory discharge of employee Dorgan and notify him in writing

[8] Counsel for the General Counsel notes in his posthearing brief (at 34):

> Since Dorgan was unlawfully discharged on August 28 his authorization card was entitled to be counted as of September 4, thus giving the Union a card majority on that date of 11 out of 20. Accordingly, there is no need to decide whether Zawadowicz or [Everett Melvin] were included in the unit on that date.

[9] Under the circumstances, because the above-serious and egregious misconduct demonstrates a general disregard for the employees' fundamental rights, a broad cease-and-desist order is also warranted here. See *Interstate Truck Parts*, supra.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against him.

(d) On request, bargain in good faith with the Union as the exclusive bargaining agent of its employees in the appropriate unit described below and if an understanding is reached embody that understanding in a signed agreement. The appropriate bargaining unit is as follows:

> All truckdrivers, equipment operators and mechanics employed by the Employer at its 2129 Plainsfield Pike, Johnston, Rhode Island facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) Post at its facilities copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge and closure of our business if the employees select Rhode Island Laborers' District Council and its affiliated Local 1322, a/w Laborers' International Union of North America, AFL–CIO, the Union, as their bargaining representative; coercively interrogate our employees about employee union activities; tell our employees that we would not permit the Union to come in and thus it would be futile for the employees to select the Union as their bargaining representative; create an impression that our employees' union activities were under surveillance; and promise our employees benefits for not supporting the Union.

WE WILL NOT discriminatorily discharge our employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL offer to employee Robert K. Dorgan immediate and full reinstatement to his former job or, in the event his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his discriminatory discharge, with interest, as provided in the Board's Decision.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary and useful in analyzing and computing the amount of backpay and compliance with the Board's Decision and Order.

WE WILL expunge from our files any references to the discriminatory discharge of employee Dorgan and notify him in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against him.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent of our employees in the appropriate unit described below and if an understanding is reached embody that understanding in a signed agreement. The appropriate bargaining unit is as follows:

> All truckdrivers, equipment operators and mechanics employed by the Employer at its 2129 Plainsfield Pike, Johnston, Rhode Island facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

T&J CONTAINER SYSTEMS, INC., D/B/A T&J TRUCKING CO.